(1) 95 Nd 1007

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Does the United States Constitution impose liability on a County for a single hiring decision that comports with state law in every respect, when there is no evidence that the County's hiring practice in the past has resulted in the deprivation of a citizen's constitutional rights?

2. Does the hiring of a Reserve Deputy Sheriffwho has one misdemeanor conviction for assault and battery and traffic violations establish a causative link (amounting to deliberate indifference) between the decision to hire him and his subsequent use of force during the course of an arrest?

3. Are federalism concerns implicated by an opinion which imposes liability on a County for hiring a Reserve Sheriff Deputy with one misdemeanor assault and battery conviction and other minor offenses, when the State of Oklahoma proscribes only the hiring of individuals with felony records?

LIST OF ALL PARTIES*

1.	Board of the County Commissioners of Bryan County, Oklahoma	Defendant/ Petitioner
2.	Jill Brown	Plaintiff/Respondent
3.	Stacy Burns	Defendant/Respondent

• Since the district court dismissed the claims against Robert Morrison (a deputy sheriff) and B.T. Moore (the sheriff), they are not listed as parties in this proceeding.

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The Board of the County Commissioners of Bryan County, Oklahoma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 4a-29a) is reported at 67 F.3d 1174. A superseded opinion of the court of appeals is reported at 53 F.3d 1410. The opinion of the district court (App. C, *infra*, 30a-37a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 23, 1995. Petitioner's Petition for Rehearing of Substituted Opinion and Suggestion for En Banc Consideration were denied by written order on November 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Oklahoma Statute Title 70, § 3311 (West 1994) provides that:

> No person shall be certified as a police or peace officer in this state unless the employing agency has reported to the Council that:
>
> a. the Oklahoma State Bureau of Investigation and the Federal Bureau of Investigation have reported that such person has no record of a conviction of a felony or crime involving moral turpitude,
>
> b. such person has undergone psychological evaluation. . . . The psychological instrument utilized shall be evaluated by a psychologist licensed by the State of Oklahoma, and the employing agency shall certify to the Council that the evaluation was conducted in accordance with this provision and that the employee/applicant is suitable to serve as a peace officer in the State of

> Oklahoma. . . . This section shall also be applicable to all reserve peace officers in the State of Oklahoma, and
>
> c. such person possesses a high school diploma or a GED equivalency certificate. . . .

STATEMENT OF THE CASE

This case concerns the extent to which federal courts have constitutional authority to fashion minimum hiring qualifications for law enforcement personnel that exceed minimum standards enacted by state legislatures. In particular, the question is whether a county of government can be held to have violated the constitution by hiring a police reserve deputy with a background of misdemeanor arrests, who is found to have subsequently used excessive force in arresting a suspect, when the reserve deputy is not disqualified from employment as a matter of state substantive law. The legislature of the State of Oklahoma, having considered minimum qualifications for police-officer service, did not exclude persons with misdemeanor-arrest backgrounds from law enforcement employment. There was no evidence that the County's hiring practices resulted in a pattern of constitutional deprivations.

Although the question has never been resolved by this Court, Justice O'Connor has suggested, in a similar context, that, except where a municipality's policy is "substantially certain" to result in violation of constitutional rights, failure to train can result in municipal liability only where a pattern of constitutional violations arising from the policy puts the city on notice of the problem. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor noted that "Allowing an inadequate training claim such as this

one to go to the jury based upon a single incident would only invite jury nullification of *Monell*." In this case, the *only* alleged instance of "inadequate hiring" is the claim upon which respondent bases her complaint. Moreover, the County had discretion under state substantive law to make that hiring decision. Rather than confront those facts under a proper *Canton* analysis, the Fifth Circuit has essentially held that the State of Oklahoma does not have the right to employ deputies who have had prior misdemeanor arrests. The result is not only a nullification of *Monell*, but a serious blow to federalism.

A. Proceedings Below

Jill Brown commenced this suit under 42 U.S.C. § 1983 alleging that Bryan County, Oklahoma and three officers were guilty of violating her constitutional rights. Thus, the district court properly had jurisdiction on the basis of federal question jurisdiction according to 28 U.S.C. § 1331. She sued Stacy Burns (a reserve deputy sheriff), Robert Morrison (a deputy sheriff), B.J. Moore (the sheriff), and the Board of the County Commissioners of Bryan County, Oklahoma ("Bryan County"). Brown alleged that Stacy Burns' actions in forcibly removing her from a vehicle and handcuffing her during an investigatory stop amounted to excessive force that deprived her of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Brown alleged that Bryan County violated the Constitution either: (1) by hiring Burns or (2) failing to adequately train Burns. The district court denied the defendants' motion for summary judgment. The case was tried to a jury, which found that Stacy Burns arrested Jill Brown without probable cause; that Stacy Burns employed excessive force; that Stacy Burns falsely imprisoned Brown; and that Stacy Burns was not entitled to the defense of qualified immunity.

The jury also answered interrogatories concerning Bryan County. The jury found the County liable under state tort theories of negligent hiring and negligent training. With respect to liability under § 1983, the jury found as follows:

> 1. That the hiring policy of Bryan County **"in the case of Stacy Burns"** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff;
>
> 2. That the training policy of Bryan County **"in the case of Stacy Burns"** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff.

The jury assessed a total of $765,300 in actual damages; $87,500 in attorneys fees; and $20,000 in exemplary damages, for a total award of $872,500. Finding no evidence of loss of income in the past or loss of earning capacity in the future, the court rendered judgment against Brown for those amounts. Thus, the district court entered judgment against Burns and the County for the $711,302 in actual damages; $87,500 in attorneys fees; and $20,000 in punitive damages. The district court did not award Brown any recovery against defendants Morrison and Moore. Burns and the County appealed the judgment.

In its opinion, the Fifth Circuit held that the County's hiring of Stacy Burns violated Jill Brown's constitutional rights. The court recognized that Burns had met the requirements for employment mandated by Oklahoma law. However, the court found that Burns' misdemeanor offenses would allow a jury to conclude "that Burns had a propensity for violence and a disregard for the law, thus, precluding his employment." *Brown v. Bryan County, Okl.*, 67 F.3d at 1184 n.20 (App. B, 22a). The

court wrote that the County's "single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.* at 1185 (App. B, 24a).

Justice Emilio Garza dissented from the majority's opinion and judgment with respect to Bryan County. In Justice Emilio Garza's view, "*one* inadequate background investigation, even by a municipal policymaker, is not the 'unconstitutional municipal policy' of which *Monell, Pembaur,* or *Tuttle* speaks." *Id.* at 1185. (internal citations omitted). Justice Emilio Garza articulated the basis for his dissent as follows:

> I do not agree, therefore, with the majority's implicit reasoning, explicitly stated in *Gonzalez*, that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." ... The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation. . . .

Justice Emilio Garza would have reversed the judgment as to Bryan County. *Id.* at 1187 (App. B, 27a).

B. Summary of the Issues

1. Federalism

There is no constitutional provision or federal law forbidding the hiring of an individual with a background of

misdemeanor arrests. There is no state law precluding the County from employing such a person; indeed, the State of Oklahoma proscribes only the hiring of deputies with convictions for felonies or crimes involving moral turpitude. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). Where the hiring decision is not itself unconstitutional and no federal law governs the hiring decision, concepts of federalism dictate that the State of Oklahoma's qualifying standards for police service should control. *See Rizzo v. Goode*, 423 U.S. 362, 378-380, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976). In the absence of a pattern of constitutional deprivations arising from the adoption of a particular hiring standard, there is no constitutional basis for holding a county liable for its personnel choices.

The court of appeals justified finding a constitutional violation based on Stacy Burns' prior misdemeanor convictions, which, in the court's view, demonstrated a "propensity for violence and a disregard for the law" that *precluded* the County from employing him in the first place. 53 F.3d at 1184 n.20. The convictions were for offenses Burns committed during a college-campus brawl, several traffic violations, and one arrest for being in physical control of a vehicle while intoxicated. Thus, the Fifth Circuit has crafted a minimum hiring standard — apparent nowhere in the United States Constitution — which a county cannot disturb without committing a constitutional violation. The court's substitution of a federal hiring standard for Oklahoma's, without articulating any reasoned basis for such, will "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs" which, as this Court has recognized, "implicates serious questions of federalism." *Canton v. Harris*, 489 U.S. 378, 392 (1989).

2. Causation

Respondent Jill Brown failed to establish a direct link

between the county's hiring of Burns and a constitutional deprivation. At most, Brown demonstrated that Burns had had two fights before becoming a reserve deputy, one of which resulted in a misdemeanor assault and battery conviction. The court of appeals seized upon those offenses and a series of traffic violations to effectively hold that — as a matter of constitutional law — Burns was disqualified *ab initio* from serving as a police reserve deputy. Under that approach, the county would be strictly liable for any constitutional deprivation caused by Burns or any other deputy with a similar background. Such a holding amounts to permitting precisely the theory of strict respondeat superior liability rejected in *Monell*.

REASONS FOR GRANTING THE WRIT

This Court has held that a single decision by a single policymaker can result in municipal liability under appropriate circumstances. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur*, however, the singular decision of an authorized policymaker actually ordered the carrying out of an unconstitutional act. *Id.* at 483 n.11. In this case, the hiring decision was not, in itself, unconstitutional. Moreover, unlike *Pembaur*, it is undisputed in this case that the County's hiring conformed to the State of Oklahoma's legislative screening standards.

The Fifth Circuit's opinion charges the county with identifying, along the spectrum of human behavior, the precise components of a police candidate's prior behavior that would "likely" result in the candidate's subsequent use of unconstitutionally excessive force. In this case, the Fifth Circuit pinpointed this inevitable predisposition on Reserve Deputy Burns' misdemeanor arrests. Would the county have been liable, under the Fifth Circuit's standard, had Burns had one less traffic violation? What is the constitutional standard governing

a county's future hiring decisions? Neither question can be answered by consulting the Fifth Circuit's opinion. It is essential that this Court fill the vacuum.

Petitioner believes that the answer lies, at least in part, in an application of federalism. The State of Oklahoma has enacted legislation requiring screening of potential law enforcement personnel. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). The legislation prohibits political subdivisions from employing reserve deputies with felony records or convictions involving crimes of moral turpitude. The County did not offend those minimal standards in hiring Reserve Deputy Burns. Thus, the situation here is far different from *Pembaur*, in which the policymaker actually ordered and authorized an unconstitutional act. Here, the County conformed its conduct to the legislative screening process and hired a reserve deputy who, so far as the State of Oklahoma was concerned, passed the litmus test for hiring. Moreover, the evidence at trial established conclusively that the County had never received any complaint that its reserve deputies, or any peace officer in its employ, had ever been engaged in violating citizens' constitutional rights as a result of the county's conforming with the state's hiring standards.

Thus, the question squarely presented is whether, in the absence of any pattern of constitutional deprivations arising from a county's hiring practice, the county's decision to hire one reserve deputy – who meets every qualification to serve – subjects the county to liability for the deputy's subsequent use of force during an arrest. Absent notice that hiring personnel with misdemeanor records results in a pattern of constitutional deprivations, a municipality may not be subjected to liability for one instance of hiring a person who is subsequently found to have used excessive force. In the absence of other similar instances, a county's hiring decision cannot reasonably be equated with deliberate indifference.

I.

THE COURT OF APPEALS' OPINION IMPROPERLY SUBSTITUTES A FEDERALIZED NOTION OF MINIMAL POLICE HIRING STANDARDS FOR STANDARDS ENACTED BY THE STATE OF OKLAHOMA.

The State of Oklahoma leaves to its political subdivisions the discretion to hire deputies whose records are devoid of felony convictions or crimes involving moral turpitude. *See* Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). In addition to those standards, Oklahoma requires deputies to meet stringent training requirements, to be supervised by licensed peace officers and, as a predicate to certification, to pass a battery of psychological testing. Thus, in the State of Oklahoma, a county is authorized to hire a reserve deputy even if the deputy has a record of misdemeanor arrests and traffic violations. The Fifth Circuit, however, has held that a county subjects itself to liability, under § 1983, if a person hired under Oklahoma's scheme is subsequently found to have deprived a citizen of constitutional rights.

The court of appeals concluded it did not matter that petitioner had offended none of the hiring requirements enacted by the State of Oklahoma; it did not matter that, prior to this case, petitioner had never had complaints that its conformity with State hiring standards produced violations of citizens' constitutional rights; it was irrelevant that Stacy Burns was qualified to serve as a reserve deputy according to Oklahoma law. The Fifth Circuit held that Burns was *precluded* from serving as a reserve deputy because of his background of misdemeanor arrests. The danger in such a holding should be evident; rather than analyze policy and custom to determine municipal liability under § 1983 and the United States Constitution, the court of appeals has arrogated to itself the

power to determine if a state's particular hiring standards meet the court's own minimum federal standards.

There is no limiting principle apparent in the court's opinion. In this case, where the reserve deputy had misdemeanor arrests for a college campus brawl and several traffic violations, the court of appeals held the county to be "deliberately indifferent" for hiring him. It is unclear whether, in another case, a similar applicant with one less offense would meet the new federal personnel policy. In any event, it is clear that the court of appeals has effectively placed a shadow injunction on the State of Oklahoma's statutory qualifications for reserve-deputy and peace-officer employment. Juries will now be charged with determining municipal liability under section 1983 based on whether the municipality was "precluded" from hiring a person otherwise qualified under state law.

The federalism concern has, in prior decisions of this Court, been central in defining municipal liability. Without some limitation on liability, the "deliberate indifference" standard of *City of Canton v. Harris* will devolve into "an endless exercise of second-guessing" hiring determinations that, so far as state law is concerned, pass muster. *City of Canton v. Harris*, 489 U.S. at 392. In this case, where there is no evidence that the county's conformity with State of Oklahoma standards ever resulted in a pattern of constitutional deprivations, the Fifth Circuit's conclusion that the county was "deliberately indifferent" in hiring Reserve Deputy Burns amounts to an intrusion on state sovereignty to oversee the administration of its own law. *Rizzo v. Goode*, 423 U.S. at 378.

II.

THE COURT OF APPEALS' INTERPRETATION OF § 1983'S "DELIBERATE INDIFFERENCE" STANDARD RESULTS IN A NULLIFICATION OF *MONELL V. DEPT. OF SOCIAL SERVICES OF THE CITY OF NEW YORK.*

In *City of Canton*, this Court addressed whether a policy that is not in itself unconstitutional may nevertheless give rise to municipal liability. In addressing claims that a municipality inadequately trained its police officers, this Court held that the municipality could be held liable under § 1983 only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 390 n.10, 109 S. Ct. at __ n.10, 103 L. Ed. 2d at 427. Justice Brennan, in his concurring opinion in *City of Canton*, recognized that courts applying the "deliberate indifference" standard in a failure-to-train case "required a showing of a pattern of violations from which a kind of 'tacit authorization' by city policymakers can be inferred." 489 U.S. at 397, 109 S. Ct. at __, 103 L. Ed. 2d at 432. On numerous occasions, the Fifth Circuit and other circuits have agreed that a pattern of violations is necessary to support municipal liability in most instances. This case presents the classic case where prior notice of constitutional deprivations would be required for municipal liability.

It is not *unconstitutional* to employ a reserve deputy who has a misdemeanor arrest record. In and of itself, a hiring decision does not result in respondeat superior liability each time the hired employee commits an act depriving a citizen of constitutional rights. Hiring decisions that are constitutional *may* result, in a "but for" sense, in the deprivation of constitutional rights; but such philosophic causes, without more, are not enough to establish municipal liability. Neither is

negligence the proper standard. When the constitution marks the bounds of municipal liability, the causation element must meet a higher standard. That higher standard — deliberate indifference — is not met simply because a jury (or court) is offended by nepotism in a small county.

When a municipal policy is, itself, constitutional, the "deliberate indifference" standard can be satisfied one of two ways. First, the policy can be so certain to result in the deprivation of constitutional rights that a city may be held deliberately indifferent. *City of Canton*, 489 U.S. at 390 n.10, 109 S. Ct. at __, n. 10, 103 L. Ed. 2d at 427 n.10 (failing to instruct police officers in the use of deadly force). It is the extremity of the risk that subjects the municipality to liability under that circumstance. There are times, as in *City of Canton*, that the risk is self-evident to a "moral certainty." *Id.* It cannot be said with that same degree of certitude that individuals who have had two fights, years prior to joining a law enforcement agency, will use excessive force in arresting an individual.

Under the court of appeals' new standard, what used to be *constitutional* county policy — Oklahoma's vesting county's with discretion to hire peace officers (even with misdemeanor backgrounds) so long as they meet the state's minimum qualifications, undergo specified training, and have no felony convictions or arrests for crimes involving moral turpitude — has now become *unconstitutional ab initio*. The breadth of such a holding is astounding. As the court of appeals bluntly stated, such persons are now "precluded" from employment as law enforcement officers. This new federalized hiring standard usurps state standards and thereby subjects municipalities to § 1983 liability for pure hiring decisions. The panel does not attempt to articulate the constitutional basis for the imposition of such minimal hiring standards. Prior to this case, the Fifth Circuit rightly rejected the notion that states must conform their

training and hiring practices to meet some minimal federal standard. *See Benavides v. County of Wilson*, 955 F.2d 968, 974-75 (5th Cir. 1992), *cert. denied sub nom. Bassler v. County of Wilson*, __ U.S. __, 113 S. Ct. 79, 121 L. Ed. 2d 43 (1992).

It is also not the case, as the court of appeals assumed, that past misconduct or past emotional disability precludes future law enforcement service. *Benavides v. County of Wilson*, 955 F.2d at 974-75 (no evidence that County would have dismissed deputies from force had it had detailed accounting of deputies' prior history of psychological disorders). Likewise, there is no evidence here that Bryan County would have (or should have) dismissed Burns on the basis that Burns had one misdemeanor assault conviction stemming from a campus fight. Indeed, under Oklahoma law, the legislature has ceded to sheriffs the discretion to determine whether to employ individuals with prior misdemeanor convictions. *Haworth v. Central National Bank*, 769 P.2d 740, 743 (Okla. 1989) (recognizing Oklahoma legislature's "direct intervention and control over law enforcement officers through adoption of statute forbidding employment of felons or individuals convicted of crime involving moral turpitude).

It would be a different matter altogether if Brown had been able to demonstrate Bryan County adopted a "policy" of hiring such individuals, and that that policy resulted in *other* incidents of excessive force sufficient to alert the County that fights in college lead to excessive force in the rank and file. Of course, as even the court of appeals conceded, there is absolutely no evidence of any such pattern. 67 F.3d at 1185 n. 22 (App. B, 24a). Under these circumstances, the panel's opinion directly conflicts with this court's opinion in *Stokes v. Bullins*, 844 F.2d 269, 274-77 (5th Cir. 1988) (prior arrests did not disqualify officer from service; no persistent, widespread pattern of hiring policemen with a background of unjustified violence).

This is the second lesson of *City of Canton*. If there is no obvious, inevitable link between the constitutional policy and the deprivation of constitutional rights, then it must be shown that the policymaker was "aware of, and acquiesced in, a pattern of constitutional violations. . . ." *Id.*, 489 U.S. at 397, 109 S. Ct. at __, 103 L. Ed. 2d at 432. Until now, that has been the standard enforced in this circuit. *See Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied sub nom. Languirand v. Pass Christian*, 467 U.S. 1215 (1984), *Stokes*, 844 F.2d at 274-75; *Fraire v. Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, __ U.S. __ (1992). *See also, Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1195 (11th Cir. 1994) (requiring frequency of unconstitutional deprivation as prerequisite to County liability); *Hirsch v. Burke*, 40 F.3d 900, 904 (7th Cir. 1994) (pattern of constitutional violations is prerequisite to recovery against municipality for inadequate training).

III.

THE FIFTH CIRCUIT'S CONCLUSION THAT BRYAN COUNTY WAS DELIBERATELY INDIFFERENT IS NOT SUPPORTED BY THE FACTS.

This case presents only one instance of an alleged constitutional violation — the incident of excessive force Mrs. Brown asserts. By establishing municipal liability based on Bryan County's hiring decision, this case establishes a greatly expanded potential for liability under the auspices of section 1983. The court of appeals' opinion concludes that based upon Burns' history of arrests the jury could have found that Burns had a "propensity for violence and a disregard for the law" which " preclud[ed] his employment." 67 F.3d at 1184 n. 20 (App. B, 22a). The evidence of this "propensity" is stark indeed; in no way can it be said to a moral certainty that a person with such a background is, as a matter of constitutional law, forever barred from law enforcement service.

Burns' criminal record includes the following categories of citations and arrests: (1) nine moving traffic violations; (2) Actual Physical Control of a motor vehicle while intoxicated; (3) driving with a suspended license; (4) assault and battery; (5) possession of false identification and (6) resisting arrest. Categories one through three fail to indicate any predisposition on the part of Stacy Burns to commit violent acts. Thus, these components of the "rap sheet" Sheriff Moore had obtained in the application process fail to support an inference of deliberate indifference to the constitutional violation at issue – excessive force. Neither does the possession of false identification support this type of inference.

The remaining misdemeanors, when properly examined, lack the drama woven into the court of appeals' opinion. Both charges resulted from a fight with fraternity members which occurred while Stacy Burns was at the University of Oklahoma in September of 1989. At the time of this incident Burns had just turned nineteen. As a result of the fight, Burns pled guilty to assault and battery. The Fifth Circuit opines that this type of evidence should have somehow placed Bryan County on notice that despite training, supervision, psychological evaluations and testing, Burns would nevertheless be predisposed to committing acts of unconstitutional aggression. Under principles not only of federalism but of common sense, the State of Oklahoma and Bryan County could logically conclude that a person with Burns background can, under proper supervision, redeem himself and serve the force with distinction. The evidence simply does not establish to a moral certainty that the county was deliberately indifferent in deciding that Burns could, in spite of the one campus fight, serve as a reserve deputy.

Oklahoma's requirements for service in its sheriffs' departments are detailed in Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). The Oklahoma Statute creates a

Council on Law Enforcement Education and Training that is responsible for promulgating rules and regulations regarding certification and policies for admission requirements for Oklahoma officers. § 3311(A), (B). This statute provides that applicants with felony convictions or crimes involving moral turpitude are disqualified from service. § 3311(D)(2)(a). Additionally, the statute requires that the applicant undergo one of several psychological tests approved by the Council on Law Enforcement Education and Training which is then evaluated by a licensed psychologist. § 3311(D)(2)(b). The applicant must also possess a high school diploma or a GED equivalency certificate and must satisfactorily complete a basic police course of 120 hours. § 3311(D)(2)(c).

This statute promulgated by the Oklahoma Legislature outlines the official policy in effect at the time Bryan County hired Stacy Burns. Bryan County followed each of the requirements of the legislation in its hiring procedures of all its applicants, including Stacy Burns. None of the charges in Burns' record fall within the categories which require disqualification under Oklahoma law. Furthermore, the additional prerequisites for service were followed in the hiring of Stacy Burns.

The law of the State of Oklahoma, therefore, authorized the hiring decision of Sheriff Moore. As a protection for constitutional violations, section 1983 was never intended to disturb objectively reasonable legislative decisions regarding the requirements for employment by municipal authorities. Under the guise of constitutional authority, the court of appeals has determined that a single constitutional hiring decision authorized by the laws of that State may constitute a policy or custom sufficient to establish municipal liability when it has never been demonstrated that a person's history of misdemeanor arrests would inevitably result in the violation of citizens' constitutional rights.

CONCLUSION

This is an ideal case for this Court to demonstrate how federalism affects a federal court's review of municipal liability. The new Fifth Circuit standard holds that, even if there is evidence of only *one* incident arising from a policy that is not in itself unconstitutional, municipal liability is established if the County was "precluded" from hiring an officer in the first place by virtue of two adolescent fights. Under this standard, the court of appeals concluded that it did not matter that Bryan County *never* had a similar incident in the past; it did not matter that the County had *always* conducted adequate background investigations with respect to *every other* officer and cadet candidate; it did not matter that the *only* incident of excessive force Burns was *ever* charged with stemmed from his confrontation with Jill Brown after the high-speed pursuit; it did not matter that Stacy Burns had *never* had a felony conviction, or that his criminal record revealed only *one* misdemeanor episode of violence. Instead, the court of appeals focused on the singular instance of the hiring of Burns, declared that that hiring "policy" was, in itself, sufficient to show deliberate indifference, and concluded that there is an "affirmative link" between hiring a deputy with misdemeanors in his past and any excessive force he uses while so employed. That is *respondeat superior* liability, which *Monell* forbids and which this Court has rejected. Such a marked departure from once-settled constitutional doctrine deserves review by this Court by granting a writ of certiorari.

These reasons justify a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED NOVEMBER 29, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5376

JILL BROWN,

Plaintiff-Appellee,
Cross-Appellant,

versus

BRYAN COUNTY, OK, ET AL.

Defendants,

BRYAN COUNTY, OK and STACY BURNS,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion , 5 Cir., , F.3d)

(November 29, 1995)

Appendix A

Before REYNALDO G. GARZA, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

* * *

(x) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Reynaldo G. Garza
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REH FLD 11/6/95

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 23, 1995

**JILL BROWN, Plaintiff-Appellee,
Cross-Appellant,**

v.

BRYAN COUNTY, OK, et al., Defendants,

**Bryan County, OK and Stacy Burns,
Defendants-Appellants, Cross-
Appellees.**

No. 93-5376.

United States Court of Appeals,

Fifth Circuit.

Oct. 23, 1995.

* * *

Appeals from the United States District Court for the Eastern District of Texas.

(Opinion June 2, 5th Cir.,
1995, 53 F.3d 1410)

Before REYNALDO G. GARZA, WIENER and EMILIO M. GARZA, Circuit Judges.

Appendix B

REYNALDO G. GARZA, Circuit Judge:

SUBSTITUTE PANEL OPINION[1]

A claim for damages was brought against Reserve Deputy Stacy Burns (Burns) and Bryan County, Oklahoma (Bryan County),[2] by Jill Brown (Mrs. Brown) pursuant to 42 U.S.C. § 1983 and Oklahoma law. The case proceeded to trial, in which the jury found in favor of the Plaintiff on every interrogatory submitted. The district court entered a judgment in accordance with the jury's verdict with one exception: Mrs. Brown was not allowed to recover for loss of past income or future earning capacity. Burns and Bryan County (collectively the "Appellants") appeal the judgment against them while Mrs. Brown appeals the portion of the judgment that denied her recovery for lost past income and future earning capacity. For the reasons stated below we affirm the district court's judgment.

BACKGROUND

In the early hours of May 12, 1991, Todd Brown (Mr. Brown) and Mrs. Brown were traveling from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, Mr. Brown, who was driving, noticed a police checkpoint. He decided to avoid the checkpoint and

1. The original panel opinion, to which Judge Emilio M. Garza dissented, *Brown v. Bryan County, Ok.*, 53 F.3d 1410 (5th Cir.1995), is withdrawn and is replaced in toto by this opinion, in which Judge Wiener continues to concur.

2. This suit was originally brought against several parties, but the district court dismissed the claims concerning the other Defendants, leaving Bryan County and Stacy Burns as the only Defendants.

Appendix B

headed back to Texas, allegedly to spend the night at his mother's house. Although the parties offer conflicting stories leading to the pursuit, Deputy Sheriff Robert Morrison (Deputy Morrison) and Burns stated that they "chased" the Browns' vehicle at a high rate of speed before successfully pulling it over. Mr. Brown testified that he was oblivious to the deputies' attempts to overtake him until both vehicles had traveled approximately three miles.[3] By the time the two vehicles eventually stopped, the parties had crossed into Grayson County, Texas, four miles from the Oklahoma checkpoint.

Immediately after exiting the squad car, Deputy Morrison unholstered his weapon, pointed it toward the Browns' vehicle and ordered the occupants to raise their hands. Burns, who was unarmed,[4] rounded the corner of the truck to the passenger's side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from the seat of the cab and threw her to the ground. Burns employed an "arm bar" technique whereby he grabbed Mrs. Brown's arm at the wrist and elbow, extracted her from the vehicle and spun her to the ground. Mrs. Brown's impact with the ground caused severe injury to her knees, requiring corrective surgery.[5] While Mrs. Brown was pinned to the ground, Burns handcuffed her and left to assist Deputy

3. Apparently, the road traveled on was winding, thereby, diminishing the visibility of other vehicles approaching from behind.

4. Although Burns was working for the Sheriff's Department, he was not authorized to carry a firearm or drive a squad car.

5. Mrs. Brown received a total of four operations on her knees. Moreover medical testimony was elicited at trial which showed that Mrs. Brown would ultimately require total knee replacements.

Morrison in subduing her husband. Mrs. Brown remained handcuffed anywhere from a minimum of thirty minutes to just over an hour.

According to Mrs. Brown's version of the facts, which will be reviewed in greater detail below, the deputies' pursuit and the force consequently applied against her were unprovoked. Furthermore, she claims that her detention constituted false imprisonment and false arrest. Due to the injuries resulting from that encounter, Mrs. Brown seeks compensation from Burns and Bryan County. Mrs. Brown premised the county's liability, inter alia, on the hiring of Burns by Sheriff B.J. Moore (Sheriff Moore), the county policymaker for the Sheriff's Department.

DISCUSSION

The Appellants have presented this Court with a host of issues to support their position that the lower court erred. For efficiency's sake, we will address only those points that we believe merit review. We first address the claims against Burns for the constitutional injuries that Brown suffered.

I.

In their first argument, Burns and Bryan County allege that the force applied against Mrs. Brown was proper. Appellants claim that the evidence "undisputedly" established that Burns' actions on the morning of May 12, 1991, were objectively reasonable. Therefore, the jury's findings should be reversed.

All claims that a law enforcement officer has used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, are

analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The test of reasonableness under the Fourth Amendment requires

> careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396, 109 S.Ct. at 1872. The "reasonableness" of the particular force used must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. *Id.* In cases implicating excessive force, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. *Id.* (citation omitted). Thus, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Id.* at 397,109 S.Ct. at 1872.

Determining whether Burns' actions were reasonable depends on whose story the trier of fact accepts as true. According to the testimony of Burns and Deputy Morrison, they were involved in a "high-speed" pursuit[6] after the Browns abruptly turned their truck and sped from the checkpoint.

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6. The deputies testified that they were pursuing the Browns at speeds in excess of 100 miles per hour.

After a four mile "chase" both vehicles came to a full stop. The deputies exited their vehicle and made several commands for the occupants to raise their hands before those commands were obeyed. After rounding the truck, Burns twice ordered Mrs. Brown to exit the vehicle, but she did not comply. He then perceived that she was "lean[ing] forward" in the cab of the truck as if she were "grabbing a gun."[7] He was "scared to death," so he extracted her from the vehicle. He spun her around, dropped her to the ground via the arm bar maneuver and handcuffed her. That was the lowest amount of force he deemed necessary to extract her and ensure he and his partner's safety.

Certainly, Appellants' version of the facts supports a claim that Burns acted reasonably and with an appropriate amount of force. The Browns, however, paint a strikingly different picture. They testified that they were oblivious to the attempts made by the deputies to catch up to them (the Browns) after avoiding the Oklahoma checkpoint.[8] Mr. Brown avoided that stop because he feared the possibility of being harassed or unnecessarily detained by the deputies.[9] He

7. The fact that two firearms were found in the truck *after* the arrest does not make Burns actions any more or less reasonable, unless his actions had resulted from the observation of those guns prior to the arrest. That was not the case, however.

8. Mr. Brown testified that initially, he did not hear any police sirens, or observe a squad car following them. Finally, after driving for several minutes at speeds of 40 to 55 miles per hour, he glimpsed the blue lights from the deputies' vehicle and determined that he was being pursued. He stopped the truck at the first available opportunity.

9. Mr. Brown alleged that he had been unnecessarily detained at that checkpoint on several occasions.

further testified that he did not believe that he turned the truck around either in a reckless fashion nor with wheels squealing or throwing gravel, and that he drove away at a normal rate of speed. Finally realizing that they were being pursued, Mr. Brown pulled over only to find a gun pointed at him. They were ordered to put their hands up and they did so.

Mrs. Brown then testified that Burns ran to her side of the vehicle and ordered her to get out. She was paralyzed with fear and heard Burns repeat the command. According to her testimony, however, she was not slow in responding to Burns' orders and she did not make any sudden moves while exiting the vehicle. Her only forward movement was to exit the truck and, contrary to Burns' testimony, she did not reach for anything. Then, while she was exiting the truck, Burns suddenly grabbed her arm, yanked her out, spun her around and threw her to the pavement. She could not break her fall because one arm was raised and Burns firmly gripped the other.

In addition to this conflicting testimony, both sides elicited expert testimony concerning the reasonableness of Burns' actions. Mrs. Brown's expert, for example, concluded that the force applied by Burns in this situation was unjustified and excessive.[10] The jury weighed all the evidence, evaluated the conflicting testimony and rendered a verdict in Mrs. Brown's favor. Under our standard of review,[11] when the

10. The expert did acknowledge that the force used was the lowest force that could have been applied in extracting and subduing an arrestee without endangering either party. However, he did not feel that the situation required this type of force.

11. The standard for appellate review of a jury's verdict is exacting.

(Cont'd)

evidence supports the verdict, this Court will not impose its own opinion in contravention to the jury's. Therefore, we will not interfere with the fact finder's conclusion that Burns' actions were unreasonable and that the force he used was excessive.

II.

Notwithstanding the jury's findings, Appellants also assert that there was probable cause to arrest Mrs. Brown. They argue that the facts justified Burn's actions, thereby precluding Mrs. Brown's § 1983 claim for false arrest.

There is no cause of action for false arrest under § 1983

(Cont'd)
Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir.1988). It is the same standard as applied in awarding a directed verdict or a judgment notwithstanding the verdict and is referred to as the "sufficiency of the evidence" standard. *Id.* The standard is as follows:

> "The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded."

Id. (quoting *Western Co. of North Am. v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983)). Stated another way, the Court should consider all of the evidence, not just that evidence which supports the non-movant's case, in the light and with all reasonable inferences most favorable to the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc).

unless the arresting officer lacked probable cause. *Fields v. City of South Houston*, Tex., 922 F.2d 1183, 1189 (5th Cir.1991). To determine the presence or absence of probable cause, one must consider the totality of the circumstances surrounding the arrest. *United States v. Maslanka*, 501 F.2d 208, 212 (5th Cir.1974),[12] *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975). Whether officers have probable cause depends on whether, at the time of the arrest, the " 'facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the arrested] had committed or was committing an offense' " *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964)). Furthermore, although flight alone will not provide probable cause that a crime is being committed, in appropriate circumstances it may supply the " 'key ingredient justifying the decision of a law enforcement officer to take action.' " *United States v. Bowles*, 625 F.2d 526, 535 (5th Cir.1980) (quoting *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir.), *cert. denied*, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976)).

To reiterate, whether Burns had probable cause to arrest Mrs. Brown depends in large part on whether the facts, as Burns knew them, were sufficient to warrant a prudent man's belief that Mrs. Brown committed or was in the process of committing a crime. The facts material to that determination

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12. In *Maslanka*, a police officer observed a car coming down a road and, upon seeing his unmarked car, it turned around and sped away in flight. This Court found that this observation provided sufficient facts for an officer to investigate. *Maslanka*, 501 F.2d at 213. Upon stopping the car, the officer smelled marihuana smoke, creating the probable cause necessary to arrest the passengers. *Id.*

were hotly contested, especially the contradictory testimony relating to the pursuit and Mrs. Brown's movements while exiting the vehicle. Thus, it was for the fact finder to determine whether Burns had probable cause to arrest Mrs. Brown. *Harper v. Harris County, Tex.*, 21 F.3d 597, 602 (5th Cir. 1994). Assuming *arguendo* that the deputies had a reasonable suspicion to perform an investigatory stop, we nevertheless find the evidence sufficient to support the jury's finding that Burns did not have probable cause to arrest Mrs. Brown, and that his doing so violated her constitutional right to be free from false arrest.

As the jury found that Burns did not have probable cause to detain or arrest Mrs. Brown, it could also find from the evidence that she was falsely imprisoned. To set out a claim for false imprisonment the plaintiff must prove (1) an intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. *Harper v. Merckle*, 638 F.2d 848, 860 (5th Cir. Unit B Mar.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). Under § 1983, the plaintiff must also prove the deprivation of a constitutional right, i.e., an illegality under color of state law. *Id.* The evidence establishes that Mrs. Brown believed herself to be under arrest: even though she had committed no crime, she remained handcuffed for approximately an hour before being released, during which time she was never informed of the nature of the charges for which she was being detained, and subsequently no charges were ever brought. In light of such evidence, a finding of false imprisonment is proper.[13]

13. As this Court finds that liability was proper for the claims of excessive force, false arrest and false imprisonment, it need not address the state law issues involved herein.

III.

Appellants also contest the jury's finding that Burns was not entitled to qualified immunity. A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry. *See Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). First, we determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232, 111 S.Ct. at 1793. Second, we establish whether the law was clearly established at the time of the official's action. *Siegert*, 500 U.S. at 233, 111 S.Ct. at 1794; *Harlow*, 457 U.S. at 815-19, 102 S.Ct. at 2737-38. Third, we evaluate the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818,102 S.Ct. at 2739. It is clear that by 1991, use of excessive force, false arrest and false imprisonment had been held to violate citizens' constitutional rights, thus the qualified immunity defense fails if Burns did not act with probable cause. And as the trier of fact determined that Burns did not have probable cause to arrest Mrs. Burns, he is not entitled to qualified immunity.[14]

IV.

Burns asserts that the evidence is insufficient to support the jury's award of punitive damages. He argues that

14. "While it is correct that the reasonableness of the arresting officer's conduct under the circumstances is a question of law for the court to decide, such is not the case where there exist material factual disputes . . ." *Harper v. Harris County, Tex.*, 21 F.3d 597, 602 (5th Cir.1994) (discussing officer's qualified immunity).

application of the arm bar technique did not rise to a level of "flagrant" conduct and further, that it did not evidence malice or give rise to an inference of evil intent.[15] Nevertheless, the Supreme Court has ruled that punitive damages are recoverable in a § 1983 action. *Smith v. Wade*, 461 U.S. 30, 35, 103 S.Ct. 1625, 1629, 75 L.Ed.2d 632 (1983). One of the primary reasons for § 1983 actions and punitive damages is to deter future egregious conduct. *Id.* at 49, 103 S.Ct. at 1636. A jury may assess punitive damages in an action under § 1983 if the defendant's conduct is shown to be motivated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others. *Id.* at 56, 103 S.Ct. at 1640. The question is whether the acts of Burns, which caused the deprivation of Mrs. Brown's constitutional rights, rose to a level warranting the imposition of punitive damages. In light of the evidence before it, we believe that the jury could properly infer that Burns' acts were unjustified and that he acted with callous or reckless indifference to Mrs. Brown's constitutional rights. Therefore, punitive damages were justified.

V.

On cross-appeal, Mrs. Brown argues that it was error for the district court to grant Appellants' Motion for Judgment Notwithstanding the Jury Verdict (JNOV) as it relates to her claims for loss of past income and future earning capacity.[16]

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15. Mrs. Brown did not respond to this argument in her briefs.

16. In the order, the district court stated "[t]he jury awarded plaintiff substantial damages in this case, including $36,000 for loss of income in the past and $180,000 for loss of earning capacity in the future. After a review of the evidence in this case, the Court is convinced that there is no legally sufficient

(Cont'd)

Mrs. Brown asserts that neither Bryan County nor Burns specifically raised an issue concerning the sufficiency of the evidence supporting that portion of the judgment, thus the district court's action was unjustified and the award must be reinstated. She insists that there is absolutely no legal predicate on which the district court could base its actions. Therefore, as evidence was offered to support this award, Mrs. Brown argues that the original jury award should be reinstated.

This Court has determined that it "would be a constitutionally impermissible re-examination of the jury's verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir.1993). It is undisputed that the Appellants did not address the sufficiency of the evidence supporting the jury's award for loss of past income and future earning capacity in their motions for either directed verdict or JNOV. Thus, the lower court should not have decided whether sufficient evidence exists to support this award. However, as the Appellants point out, Mrs. Brown failed to object to this error at trial, and it is the "unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error." *Id.* In other words, this Court will reverse only if the error complained of results in a "manifest miscarriage of justice." *Id.* Furthermore, contrary to Mrs. Brown's contention, the issue is not whether *any* evidence exists to support the jury verdict. Instead, the issue is whether the district court's action constituted plain error.

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evidentiary basis for the award of these damages. Therefore, judgment should be granted for the defendants on plaintiff's claims for loss of income in the past and loss of earning capacity in the future."

Upon reviewing the record, we do not believe that the lower court's error resulted in a manifest miscarriage of justice. The only evidence offered in support of the award comprised of Mrs. Brown's testimony, which reflected that she had accepted an offer to commence work a few days after the day of the incident. Her compensation would have been measured on a commission basis, which she believed would have paid between $1,500 to $1,800 a month. The district court's ruling that this evidence was lacking does not arise to plain error. Mrs. Brown's failure to object at the appropriate time denied the district court the opportunity to rectify any errors. Therefore, the court's ruling will stand.

VI.

Having found that Burns violated Mrs. Brown's constitutional rights, the next inquiry concerns the possible liability of Bryan County. Liability will accrue for the acts of a municipal official when the official possesses "final policymaking authority" to establish municipal policy with respect to the conduct that resulted in a violation of constitutional rights. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) (plurality opinion).

Bryan County stipulated that Sheriff Moore was the final policymaker for the Sheriff's Department. As such, it is patently clear that Sheriff Moore[17] is an official "whose acts or edicts may fairly be said to represent official policy and whose

17. Appellants failed to object to the jury instructions which referred to Sheriff Moore as the final policymaker. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir. 1993) (failure to lodge an objection to court's instructions regarding the final policymaker waived the issue).

decisions therefore may give rise to municipal liability under § 1983." *Id.* at 480, 106 S.Ct. at 1299 (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978)).

Mrs. Brown argues that a municipality can be held liable under § 1983 based on a final policymaker's single decision regarding the hiring or training of one individual. Appellants, on the other hand, argue that § 1983 liability cannot attach on the basis of a policymaker's single, isolated decision to hire or train one individual.

An argument similar to the Appellants' was rejected by this Court in *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir.1993). In *Gonzalez*, the Ysleta Independent School District (YISD) was sued for a single decision to transfer a teacher accused of sexually harassing a student, rather than removing him from the classroom. YISD argued that this ad hoc, isolated decision, even when made by policymakers, did not constitute the sort of "policy" upon which municipal liability could be predicated under *Monell*. This was especially true there, insisted YISD, as the decision was contrary to the district's own formal policy for handling such matters. This argument proved unpersuasive.

Based on the facts before it, the *Gonzalez* panel concluded that the final policymaker's single, conscious decision, i.e., the Board of Trustee's decision to transfer the teacher rather than remove him from the classroom, constituted a "policy" attributable to the school district. *Gonzalez*, 996 F.2d at 754. This conclusion was logical, as "[n]o one has ever doubted . . . that a municipality may be liable under § 1983 for a *single decision* by its properly constituted legislative body . . .

because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298 (emphasis added).[18] To deny compensation to the victim in such a case would be contrary to the fundamental purpose of § 1983. *Id.* at 481, 106 S.Ct. at 1299. So, it is clear that a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity.

Mrs. Brown argues that Burns' lengthy criminal history should have prevented Sheriff Moore from hiring him. Burns' history revealed a string of offenses that, she claims, demonstrates a disregard for the law and a propensity for violence. Moreover, she maintains that a thorough investigation of Burns' background would have revealed that his parole had been violated by his numerous offenses. Thus, she argues that Burns' screening and subsequent employment by Sheriff Moore were inadequate and subjected Bryan County to liability.

During the application process Sheriff Moore ordered a printout of Burns' criminal record, which revealed the following citations and arrests: nine moving traffic violations, Actual Physical Control (APC) of a motor vehicle while intoxicated, driving with a suspended license, arrest for

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18. In *Pembaur*, the Supreme Court held that a county prosecutor's single decision, ordering law officers to forcibly enter a dentist's office, was actionable under § 1983. 475 U.S. at 480-81, 106 S.Ct. at 1298-99. However, the Court cautioned that liability would only attach where the course of action was deliberately chosen by a decisionmaker possessing final authority to establish municipal policy. *Id.* at 481, 106 S.Ct. at 1299. We note that Mr. Pembaur's § 1983 action was premised on a theory of municipal policy and not on a theory of municipal custom. *Id.* n. 10.

assault and battery, conviction for possession of a false identification and an arrest for resisting lawful arrest. When Sheriff Moore was examined about Burns' "rap sheet," the following exchange took place:

> Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet?
>
> A. I run his driving record, yes.
>
> Q. All right. And you can get that rap sheet immediately, can't you?
>
> A. It don't take long.
>
> Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery? Did you see that one on there?
>
> A. I never noticed it, no.
>
> Q. Did you notice on there he'd been arrested or charged with [Driving While License Suspended] on several occasions?
>
> * * * * * *
>
> A. I'm sure I did.
>
> Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification?

A. No, I never noticed that.

Q. Did you notice on there where he had been arrested for public drunk?

A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest?

A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were?

A. No, I didn't.

Q. Did you not make any attempt to find out the status of Mr. Burns' criminal record at that time?

A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and — most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there?

A. I didn't know he was on probation, no.

Q. Did you make any effort to find out?

A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with [Driving Under the Influence], didn't you?

A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

Q. So you'd heard about it?

* * * * * *

A. I don't remember whether I seen it on the rap sheet or heard about it.

Besides this damaging testimony, Mrs. Brown's expert[19] testified regarding the importance of properly screening law enforcement applicants. The expert testified that a thorough investigation process is needed to weed out individuals who enter the police force for the wrong reasons, for example, because "they like to exert their power." In light of Burns' arrest record, the expert concluded that he showed a "blatant

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19. The record shows that the expert, Dr. Otto Schweizer, had spent over twenty years in law enforcement, including, several years as a field training officer, a police chief and as a professor of criminal justice and police administration at the University of Central Oklahoma.

disregard for the law and problems that may show themselves in abusing the public or using excessive force," thereby rendering Burns unqualified for a position in law enforcement. The expert further testified that as a minimum, Sheriff Moore should have investigated the disposition of the charges against Burns. Even Appellants' expert, Ken Barnes, agreed that Burns' criminal history should have caused some concern, meriting a further review of the applicant. More importantly, when Mr. Barnes was asked if he would have hired Burns, he replied that it was "doubtful."

From the foregoing evidence, the jury could have reasonably inferred that Sheriff Moore "closed his eyes" to Burns' background when hiring him. This inference is reinforced by Burns' familial relations within the Sheriff's Department: not only is Burns the son of Sheriff Moore's nephew, but Burns' grandfather had been involved with the department for more than sixteen years. Alternatively, the jury could have inferred that Sheriff Moore was indeed aware of Burns' past problems with the law and was therefore cognizant of his deficient character, but nevertheless opted to employ him because he was "family".[20] Again, the innuendos of nepotism only bolster the inference that Burns would have been hired regardless of his criminal history.

We believe that the evidence supports the jury's conclusion that Sheriff Moore did not conduct a good faith investigation of Burns. Although it is true that Sheriff Moore

20. In light of the string of arrests and convictions, a jury could properly conclude that Burns had a propensity for violence and a disregard for the law, thus, precluding his employment. We deem such a conclusion proper, even though Burns had no felonies on his record. Oklahoma law prevents a sheriff from hiring an individual convicted of a felony or a crime involving moral turpitude. OKLA. STAT.ANN. tit. 70, § 3311(d)(2) (West 1994).

ran a NCIC check of Burns, this action was futile given that Burns' arrest history was all but ignored. Sheriff Moore conceded that Burns' record was so long that he did not bother to examine it. And, except for this feeble attempt to screen him, no other effort was made to investigate Burns. A further examination would have revealed that Burns had repeatedly violated probation, and that a warrant was subsequently issued for his arrest. In light of this history, it should have been obvious to Sheriff Moore that a further investigation of Burns was necessary.

We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. *See Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir.1988); *Wassum v. City of Bellaire, Texas*, 861 F.2d 453, 456 (5th Cir.1988); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. *See City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989).[21] The failure to conduct a good faith investigation of the prospective

21. Further, the lower court's charge to the jury was proper: "Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff."

employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background.[22] Such indifferent behavior cannot be tolerated when the prospective applicant will be employed in a position of trust and authority.

Additionally, the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown. That is, the policymaker's (Sheriff Moore's) single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains. *Benavides*, 955 F.2d at 972; *Fraire v. City of Arlington*, 957 F.2d 1268, 1277 (5th Cir.) (section 1983 liability attaches only "where the municipality itself causes the constitutional violation" at issue), *cert. denied*, __ U.S. __, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992). Therefore, the violation of Mrs. Brown's constitutional rights was affirmatively linked to Bryan County's decision to hire Burns for law enforcement activities. *Stokes v. Bullins*, 844 F.2d 269, 276 (6th Cir.1988).

CONCLUSION

After a thorough review of the record, this Court finds that the evidence supports the jury's verdict holding Burns and Bryan County liable for Mrs. Brown's § 1983 claim based on her false arrest, false imprisonment and the inadequate hiring of Burns. We also find that the district court did not plainly err

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22. It is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street, but the fact that he diverged from that practice as to this one individual does not save the County from liability. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir.1993).

in dismissing the jury's award for Mrs. Brown's loss of past income and future earning capacity. For these reasons, the jury's verdict stands and the district court's judgment is

AFFIRMED.

Appendix B

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

Although I concur in most of the opinion of the Court, I dissent from Part VI of the opinion and the judgment as to Bryan County. My disagreement is with the majority's treatment of the *Monell*[1] issue — "it is clear that a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity" maj. op. at __ — which is based on our prior opinion in *Gonzales v. Ysleta Indep. Sch Dist.*, 996 F.2d 745, 754 (5th Cir.1993).

Clearly, Sheriff Moore was a policymaker under *Monell*; clearly, he hired Reserve Deputy Stacy Burns; clearly, there is sufficient evidence to support a finding that Sheriff Moore was deliberately indifferent in failing to conduct an adequate background investigation.[2] However, *one* inadequate background investigation, even by a municipal policymaker, is not the "unconstitutional municipal policy" of which *Monell, Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), or *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), speaks. This error, in my opinion, flows from blurring the

1. *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 LEd.2d 611 (1978).

2. Under *Stokes v. Bullins*, 844 F.2d 269 (5th Cir.1988), "We . . . require a plaintiff [in cases such as this] to establish actual knowledge of the seriously deficient character of an applicant or a persistent, widespread pattern of the hiring of policemen, for instance, with a background of unjustified violence." *Id.* at 275 n. 9. Although the majority does not state explicitly that the jury could have found that Sheriff Moore actually knew of Burnns' criminal record, because the evidence supports such a finding, I do not disagree with the majority's conclusion that Sheriff Moore was deliberately indifferent.

Appendix B

distinction made clear in *Tuttle* — "where the policy relied upon is *not* itself unconstitutional, considerably *more proof than the single incident* will be necessary in every case to establish both the requisite *fault* on the part of the municipality, *and* the *causal connection* between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824, 105 S.Ct. at 2436 (footnote omitted) (emphasis added).

I do not agree, therefore, with the majority's implicit reasoning, explicitly stated in *Gonzalez*, that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." *Gonzalez*, 996 F.2d at 754 & n. 11 (quoting *Tuttle*, 471 U.S. at 833 n. 8, 105 S.Ct. at 2441 n. 8 (Brennan, J., concurring)). The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation.[3] There is a constitutional difference between a sheriff ordering his deputies to violate citizen's constitutional rights, *see, e.g., Pembaur*, 475 at 484-85, 106 S.Ct. at 1300-01 (imposing liability for County Prosecutor's direct order to police officers to violate Fourth Amendment), and one that hires a reserve deputy without conducting an adequate background investigation. In the latter instance, greater proof is required in order to establish the connection between the policy and the constitutional violation. *See Pembaur*, 475 U.S. at 482 n. 11, 106 S.Ct. at 1299-1300 n. 11

3. Indeed, because *Gonzalez* eventually was decided on the question of deliberate indifference, the causation question was never firmly resolved. *See Gonzalez*, 996 F.2d at 754 (stating only that the policy "may have produced or caused the constitutional violation").

(plurality opinion) (noting that *Tuttle* required the plaintiff to "establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense"); *see also City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) (requiring a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation"); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.) (requiring plaintiff to show that "the inadequate hiring . . . policy directly caused the plaintiff's injury"), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992).

The Court in *Pembaur* concluded "that municipal liability *may* be imposed for a single decision by municipal policymakers *under appropriate circumstances*." *Pembaur*, 475 U.S. at 480,106 S.Ct. at 1298. The Court also stated that *Tuttle* was "consistent" with its holding that "the policy which *ordered* or *authorized* an unconstitutional act *can* be established by a single decision by proper municipal policymakers." *Id.* at 482 n. 11, 106 S.Ct. 1299-1300 n. 11 (plurality opinion). Therefore, it is not clear that Sheriff Moore's single act of deliberate indifference in fact established "policy," even though *Pembaur* holds that a single act "*may*" or "*can*" establish policy "under appropriate circumstances." I do not believe that the Court in *Pembaur* intended to suggest that *any* and *every* act by a final municipal policymaker constitutes, without more, "municipal policy." Sheriff Moore's deliberate indifference may have caused the constitutional violation in a "but for" sense, but it did not directly "order" or "authorize" the violation. Where the policymaker's decision does *not* directly "order" or "authorize" the constitutional violation, something more than a single decision is required in order to find that this decision

in fact constitutes "municipal policy," such that we can hold the county liable. Therefore, in my view, Brown failed to establish the constitutional liability of the county on the basis of Sheriff Moore's single decision.[4] Accordingly, I would affirm the district court in all aspects, except that I would reverse as to Bryan County.

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4. I emphasize that it is the *County's constitutional* liability and not *Sheriff Moore's tort* liability that I question. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) (explaining that Due Process Clause does not constitutionalize "every tort committed by a state actor"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) ("[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." (citations omitted)); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir.) (en banc) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." (quoting *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979))), *cert. denied*, __ U.S. __, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994).

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED SEPTEMBER 20, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. 4:91cv229

JILL BROWN

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA

ORDER

On this day came on for consideration Defendants' Motion For Judgment Notwithstanding The Jury Verdict, and the Court having considered the motion and the response thereto, is of the opinion that the motion should be denied. The Court has treated the motion as a motion for judgment as a matter of law in actions tried by a jury pursuant to Rule 50, FED. R. CIV. P.

Defendants argue the following four grounds in support of their motion:

1. There was insufficient evidence to support the submission of the interrogatories to the jury which provided the basis for liability of defendant Bryan County under 42 U.S.C. § 1983.

2. The evidence in this case shows a single incident of arguably negligent hiring from which a single incident involving that same person occurred, when in order to recover under § 1983 plaintiff had to show a persistent and widespread practice of the sheriff of improperly hiring and training reserve deputies.

3. Bryan County is not liable under the Oklahoma Tort Claims Act, Title 51, Chapter 5, Oklahoma Statutes Annotated, because of the exemptions from liability set forth in § 155(5) and (28).

4. Defendant Stacy Burns was entitled to qualified immunity.

The Court will consider defendants' first and second grounds together. It is undisputed from the record in this case that Sheriff B. J. Moore ("Sheriff Moore") was the official policymaker for Bryan County, Oklahoma in the operation of the sheriff's department and the area of law enforcement. Since the holding of the Supreme Court in *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1298 (1986) it is clear that liability may be imposed on a municipality under 42 U.S.C. § 1983 for a single decision by a policymaker. The Fifth Circuit followed the reasoning of the Supreme Court in *Pembaur* to hold that a municipality may be held liable for the illegal or unconstitutional acts of its final policymakers. *Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir. 1990), *cert. denied* 498 U.S. 1069, 111 S.Ct. 788 (1991). The Fifth Circuit also relied on *Pembaur* in holding that the single decision of a local official who has final policy making authority is the official policy of a municipality upon which liability may rest under 42 U.S.C. § 1983. *Guidry v. Broussard*, 897 F.2d 181, 182 (5th Cir. 1990).

The Court has reviewed the evidence offered by plaintiff and

admitted in this case and is persuaded that the evidence supported the submission of the interrogatories to the jury which support the liability of defendants in this case. Plaintiff produced substantial evidence of defendant Stacy Burns' criminal record and prior conduct which raised an issue as to his suitability to act as a reserve deputy sheriff for Bryan County. This information was either available to Sheriff Moore or could have been easily obtained by the sheriff at the time he selected Stacy Burns to act as a reserve deputy sheriff. Plaintiff also produced evidence that Sheriff Moore made a decision to permit Stacy Burns to work as a reserve deputy sheriff at a driver's license checkpoint with no training or instructions that would equip him to determine if he had a right to pursue plaintiff into Texas and arrest and detain her there under the existing circumstances. The Oklahoma officers only had probable cause to believe that the driver of the automobile in which plaintiff was a passenger had committed misdemeanor offenses. Defendants argue that Stacy Burns was not hired. Whether he was officially hired or not, the county's policymaker selected him as a reserve deputy sheriff and authorized him to work as a reserve deputy sheriff. The evidence submitted by plaintiff supports a finding that Sheriff Moore made a conscious decision, when other alternatives were available, to select Stacy Burns as a reserve deputy sheriff and to allow him to work at the driver's license checkpoint. Plaintiff's evidence raised an issue as to whether there was a need for closer scrutiny of Stacy Burns' background before he was selected as a reserve deputy sheriff and an issue as to whether this need was so obvious and the inadequacy of the scrutiny given was so likely to result in violations of constitutional rights that Sheriff Moore could be reasonably said to have been deliberately indifferent to the constitutional needs of the plaintiff. Plaintiff's evidence also raised an issue as to whether or not, in light of the duties assigned to Stacy Burns, the need for more or different training was so obvious and the inadequacy of training so likely to result in

violations of constitutional rights, Sheriff Moore could be reasonably said to have been deliberately indifferent to the constitutional needs of the plaintiff. In the opinion of the Court, plaintiff's evidence met the necessary requirements for the creation of all of the fact issues necessary to establish municipal liability under *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197 (1989). Plaintiff's evidence also created fact issues as to whether or not the sheriff acted negligently in the selection of Stacy Burns as a reserve deputy sheriff and permitting him to work in that capacity.

The actions of Sheriff Moore in the selection and training of Stacy Burns occurred in Oklahoma. The arrest and detention of plaintiff by Stacy Burns occurred in Texas. Under the principle of comity, Texas courts should give effect to the Oklahoma Tort Claims Act unless the law is contrary to the public policy of Texas. *Lee v. Miller*, 800 F.2d 1372, 1375 (5th Cir. 1986). The Court has determined that the Oklahoma Tort Claims Act is not contrary to the public policy of Texas. The Court must now determine whether the exceptions to liability under the Oklahoma Tort Claims Act claimed by defendants apply in this case. Section 155(5) exempts from liability a loss or claim that results from "performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees." This discretionary function exemption is an extremely limited exemption from governmental liability. *Nguyen v. State*, 783 P.2d 962, 964 (Okla. 1990). Oklahoma has adopted the planning operational approach, whereby initial policy or planning decisions are discretionary, and thus exempt, while operational decisions made in the implementation and performance of the policy are ministerial. All discretion is exhausted by the development and adoption of a policy, and all acts thereafter in the implementation of the policy in specific instances are operational. The evidence in this case

shows that the initial formulation of the policy to be followed in the selection of reserve deputy sheriffs and the training to be given reserve deputy sheriffs before placing them on duty at driver's license checkpoints was discretionary, but Sheriff Moore performed a ministerial act when he selected Stacy Burns and when he placed him on duty as a reserve deputy sheriff. These decisions of Sheriff Moore were not decisions based upon balancing competing interests. His actions fall under the operational portions of the test and are not exempt under the discretionary act exemption in § 155(5).

Section 155(28) provides for an exemption from liability under the Oklahoma Torts Claims Act for "[A]cts or omissions done in conformance with then recognized standards." The evidence in this case does not support a finding that the selection of Stacy Burns and the placing him on duty at the driver's license checkpoint was done in conformance with any then current recognized standard. This exemption does not apply to this case.

Defendants' last argument is that defendant Stacy Burns was entitled to qualified immunity. The Court submitted the disputed fact issues as to qualified immunity to the jury. The Court instructed the jury on the law of qualified immunity and the jury found that Stacy Burns was not entitled to qualified immunity.

The jury awarded plaintiff substantial damages in this case, including $36,000 for loss of income in the past and $180,000 for loss of earning capacity in the future. After a review of the evidence in this case, the Court is convinced that there is no legally sufficient evidentiary basis for the award of these damages. Therefore, judgment should be granted for the defendants on plaintiff's claims for loss of income in the past and loss of earning capacity in the future.

For the above reasons, defendants' motion should be denied in part and granted in part. Judgment should be entered for plaintiff in accordance with the jury's verdict, except that plaintiff should recover nothing for loss of income in the past and loss of earning capacity in the future.

IT IS SO ORDERED.

Signed this 20th day of September, 1993.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld: 9-22-93 to: Kennedy
Sheridan
Hill
Ellis

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. 4:91cv229

JILL BROWN

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, the undersigned presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff, Jill Brown, recover of defendant The Board of the County Commissioners of Bryan County, Oklahoma, and defendant Stacy Burns, jointly and severally, the sum of Seven Hundred Eleven Thousand Three Hundred Two and No/100 Dollars ($711,302.00) as actual damages and the sum of Sixty-Five Thousand and No/100 Dollars ($65,000.00) as attorneys' fees, and from defendant Stacy Burns the sum of Twenty Thousand and No/100 dollars ($20,000.00) as punitive damages, with interest thereon at the rate of 3.43 percent per annum from date of judgment until paid, together with all costs incurred by plaintiff herein, and that plaintiff have execution therefor.

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It is further ORDERED and ADJUDGED that plaintiff, Jill Brown, recover of defendant The Board of the County Commissioners of Bryan County, Oklahoma, and defendant Stacy Burns, jointly and severally, attorneys' fees in the amount of Twelve Thousand Five Hundred and No/100 Dollars ($12,500.00) should this case be appealed to the United States Court of Appeals for the Fifth Circuit, the sum of Five Thousand and No/100 Dollars ($5,000.00) for making or responding to an application for Writ of Certiorari to the Supreme Court of the United States of America, and the sum of Five Thousand and No/100 dollars ($5,000.00) if application for Writ of Certiorari is granted by the Supreme Court of the United States.

Signed this 20th day of September, 1993.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld 9-22-93 to: Kennedy
Sheridan
Hill
Ellis

APPENDIX D — JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION DATED APRIL 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:91CV229

JILL BROWN

Plaintiff

v.

STACY BURNS, and BRYAN COUNTY, OKLAHOMA

Defendants

Verdict of the Jury

Your verdict will consist of answers to the following questions.

Interrogatory No. 1

Do you find from a preponderance of the evidence that Stacy Burns arrested Jill Brown without probable cause on May 12, 1991?

We do
(Answer "We do" or "We do not")

If you have answered Interrogatory No. 1 "We do," then proceed to Interrogatory No. 2. Otherwise, proceed to Interrogatory No. 3.

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Interrogatory No. 2

Do you find from a preponderance of the evidence that plaintiff's claim for false arrest is barred under the doctrine of qualified immunity as instructed by the Court?

We do not
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 3.

Interrogatory No. 3

Do you find from a preponderance of the evidence that Stacy Burns employed excessive force upon the plaintiff on May 12, 1991?

We do
(Answer "We do" or "We do not")

If you have answered Interrogatory No. 3 "We do," then proceed to Interrogatory No. 4. Otherwise, proceed to Interrogatory No. 5.

Interrogatory No. 4

Do you find from a preponderance of the evidence that plaintiff's claim for excessive force against the defendant Stacy Burns is barred under the doctrine of qualified immunity as instructed by the Court?

We do not
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 5.

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Interrogatory No. 5

Do you find from a preponderance of the evidence that defendant Stacy Burns is liable to the plaintiff for false imprisonment?

We do
(Answer "We do" or "We do not")

If you have answered (1) "We do" to Interrogatory No. 1 and "We do not" to Interrogatory No. 2; (2) "We do" to Interrogatory No. 3 and "We do not" to Interrogatory No. 4; *or* (3) "We do" as to Interrogatory No. 5, then proceed to Interrogatory No. 6. Otherwise proceed no further.

Interrogatory No. 6

Do you find from a preponderance of the evidence that the hiring policy of Bryan County in the case of Stacy Burns, as instituted by its policymaker B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 7.

Interrogatory No. 7

Do you find from a preponderance of the evidence that the training policy of Bryan County in the case of Stacy Burns, as instituted by its policymaker B.J. Moore, was so inadequate as to

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amount to deliberate indifference to the constitutional needs of the plaintiff?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 8.

Interrogatory No. 8

Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the hiring of reserve deputy sheriff Stacy Burns?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 9.

Interrogatory No. 9

Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the training of reserve deputy sheriff Stacy Burns?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 10.

Interrogatory No. 10

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for any damages proximately caused by

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the defendant Stacy Burns or the defendant Bryan County acting through its policymaker Sheriff B.J. Moore?

Answer in dollar and cents.

a. Past physical pain	$ *5,000*
b. Future physical pain	$ *10,000*
c. Past mental pain and anguish	$ *1,000*
d. Future mental pain and anguish	$ *1,000*
e. Past physical impairment	$ *75,000*
f. Future physical impairment	$ *360,000*
g. Past disfigurement	$ *1,000*
h. Future disfigurement	$ *2,000*
i. Loss of income in the past	$ *36,000*
j. Loss of earning capacity in the future	$ *180,000*
k. Deprivation of constitutional right not to be subjected to excessive force	$ *50,000*
l. Deprivation of constitutional right for loss of liberty . . .	$ *50,000*
m. Damage to reputation	$ *500*
n. Past medical expenses	$ *65,802*
o. Future medical expenses	$ *90,000*

Proceed to Interrogatory No. 11.

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Interrogatory No. 11

Answer this question if you have answered (1) "We do" to Interrogatory No. 1 and "We do not" to Interrogatory No. 2 *or* (2) "We do" to Interrogatory No. 3 and "We do not" to Interrogatory No. 4.

What is a reasonable fee for the necessary services of plaintiff's attorneys in this case, stated in dollars and cents?

Answer with an amount for each of the following:

a. For preparation and trial.	$ *65,000*
b. For an appeal to the Court of Appeals.	$ *12,500*
c. For making and responding to an application for writ of certiorari to the United States Supreme Court.	$ *5,000*
d. If application for writ of certiorari is granted by the Supreme Court of the United States.	$ *5,000*

Proceed to Interrogatory No. 12.

Interrogatory No. 12

What sum of money, if any, do you find in your discretion should be assessed against the defendant Stacy Burns as exemplary or punitive damages for the constitutional violations suffered by the plaintiff?

Only award punitive or exemplary damages for constitutional violation for false arrest and/or excessive force.

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Answer in dollars and cents, if any.

$ 20,000

Date: 4-19-93

s/ Debbie Reeder
Foreperson